

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-6129

B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MONROE COUNTY CONSERVATION COUNCIL,
INC., AND RAY HUTHER, ON HIS OWN
BEHALF AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

Civil Action No.
72-1363

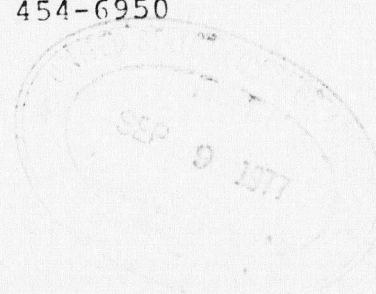
JOHN A. VOLPE, INDIVIDUALLY AND AS
SECRETARY OF THE UNITED STATES
DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

Wayne M. Harris
Attorney for Appellants
226 Powers Building
Rochester, New York 14614
(716) 454-6950



CONTENTS

	<u>Page</u>
Table of Authorities.	1
Issues Presented.	1
Statement of the Case	2
Statement of Facts.	6
Appellants' Contentions	8
 <u>Argument</u>	
I. Secretary Volpe has not complied with Section 102 of the National Environmental Policy Act of 1969 and the Department of Transportation Order 5610.1B, designed to implement it, by failing to make a social impact study of the "Outer Loop".	9-12
II. Secretary Volpe's approval of the use of the Genesee Valley Park for highway purposes was a violation of Section 138 of the Federal-Aid Highway Act, Section 4(f) of the DOT Act, and DOT Order 5610.1B, and therefore beyond the scope of his authority, and was arbitrary, capricious and an abuse of discretion	13-19
A. Secretary Volpe's approval of the use of the Genesee Valley Park for highway purposes was beyond the scope of his authority	13-18
B. Secretary Volpe's approval of the use of the Genesee Valley Park for highway purposes was arbitrary, capricious and an abuse of discretion.	18-19
Conclusion.	20
 <u>Statutes and Administrative Materials Involved</u>	
Title I, National Environmental Policy Act of 1969, 42 U.S.C. §4321, <u>et seq.</u>	A-1
Section 138, Federal-Aid Highway Act, 23 U.S.C. §138.	A-7
Section 4(f), Department of Transportation Act, 49 U.S.C. §1653(f)	A-8
DOT Order 5610.1B, p. 31, para. 15.	A-9
DOT Order 5610.1B, Attachment 2, p. 13, para. 8	A-10
DOT Order 5610.1B, Attachment 2, p. 9-10.	A-11-12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Calvert Cliff's Coordinating Committee, Inc.,</u> <u>v. Atomic Energy Commission</u> , 449 F. 2d 1109 (D.C. Cir. 1971).	16-19
<u>Citizens to Preserve Overton Park v. Volpe</u> , 401 U.S. 402 (1971).	14, 15, 18, 19
<u>D.C. Federation of Civic Associations v. Volpe</u> , 459 F. 2d 1231 (D.C. Cir. 1971) cert denied 405 U.S. 1030 (1972)	14
<u>Monroe County Conservation Council, Inc.</u> <u>et al v. Volpe</u> , 472 F. 2d 693 (2nd Cir. 1972).	12, 13, 14, 17, 18
 <u>Statutes and Administrative Material</u>	
Administrative Procedure Act, Section 706(2)(A), 5 U.S.C. §706(2)(A)	19
Department of Transportation Act of 1966, Section 4(f), 49 U.S.C. §1653(f).	13, 15, 17, 19
Department of Transportation Order 5610.1B (September 30, 1974)	10, 11, 12, 15, 19
Federal-Aid Highway Act, Section 138, 23 U.S.C. 138.	13, 15, 17, 19
Final Environmental Impact Statement	10, 11, 16, 17, 18
National Environmental Policy Act of 1969, 42 U.S.C. §4331 <u>et seq.</u>	9, 10, 11, 12, 15, 19

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MONROE COUNTY CONSERVATION COUNCIL, INC.,
and RAY HUTHER, on His Own Behalf and on
Behalf of all Others Similarly Situated,

Plaintiff-Appellants,

v.

JOHN A. VOLPE, Individually and as
Secretary of the United States Department
of Transportation,

Defendant-Appellee.

Brief for Appellants

ISSUES

- I. Whether Secretary Volpe has complied with Section 102 of the National Environmental Policy Act of 1969, and the Department of Transportation Order 5610.1B, designed to implement it.
- II. Whether Secretary Volpe acted within the scope of his authority in approving the use of parkland for federal highway purposes.
- III. Whether Secretary Volpe committed a clear error of judgment in finding that none of the alternatives to the use of the Genesee Valley Park for highway purposes were feasible or prudent.
- IV. Whether Secretary Volpe complied with Section 138 of the Federal-Aid Highway Act, Section 4(f) of the Department of Transportation Act, and the Department of Transportation Order 5610.1B, which require a review of all feasible and prudent alternatives to the taking of parklands.

STATEMENT OF THE CASE

The Appellants, Monroe County Conservation Council, Inc., and Ray Huther (hereinafter referred to as the Conservation Council), commenced this action against Appellee John A. Volpe in the District Court for the Western District of New York on July 20, 1971. The Conservation Council in its Complaint sought a declaratory judgment that the actions and proposed actions of John A. Volpe, as Secretary of the United States Department of Transportation, were illegal to the extent that he would approve federal funding for that part of the "Outer Loop" of the New York State Route 47 that is to proceed through the Genesee Valley Park. The Conservation Council also sought a preliminary and permanent injunction enjoining the Secretary Volpe from taking any further action or disbursing any federal funds with regard to the "Outer Loop" of New York State Route 47.

The Conservation Council contended that there were several feasible and prudent alternatives to the use of the Genesee Valley Park for highway purposes and that the project had not included all possible planning to minimize the harm to the park, the existence of which made federal participation in the project violative of Section 4(f) of the Department of Transportation Act of 1966 and Section 138 of the Federal-Aid Highway Act of 1968. It was also the Conservation Council's position that Secretary Volpe had not complied with Section 102(2)(c) of the National Environmental Policy Act of 1969, Section 128 of the Highway Act of 1968, nor with the Federal Highway Administration Policy and Procedure Memorandum 20-8. Further, it was contended

that Section 401 of the Rivers and Harbors Act of 1899 precluded the bridge section of this project from being constructed over the Genesee River without a permit.

Both parties made motions for summary judgment and on September 27, 1971, all motions were heard by the Honorable Harold P. Burke in the District Court for the Western District of New York. After hearing oral arguments and the testimony of Mr. Robert Kirby, Division Engineer for the Federal Highway Administration, Judge Burke reserved decision, issuing his Findings of Facts and Conclusions of Law on December 30, 1971. In his Findings, Judge Burke found that Secretary Volpe had met all procedural and substantive requirements necessary. In accordance with these Findings of Facts and Conclusions of Law a judgment was entered on January 24, 1972, denying the Conservation Council's motions for preliminary injunction and summary judgment and granting the motion of Secretary Volpe for summary judgment dismissing the Complaint on the ground that there was no genuine issue as to any material fact and that Secretary Volpe was entitled to a judgment in his favor as a matter of law.

The Conservation Council appealed from this judgment to the United States Court of Appeals for the Second Circuit by filing a Notice of Appeal with the Clerk of the District Court on February 24, 1972. On December 18, 1972, the Court of Appeals reversed the judgment of the District Court and remanded the case thereto for further proceedings, with the cost taxes against the Appellee. The Court of Appeals further enjoined the Secretary of Transportation from approving the funding of the "Outer Loop" until the Court,

after proper hearing is satisfied;

- (1) that the requirements of NEPA have been met, including the preparation and good faith consideration of an impact statement;
- (2) that there is no feasible and prudent alternative to the taking of parkland and that all possible planning has been done to minimize harm to the Park;
- (3) that the State has held the hearing required by 23 U.S.C. §128(a) and filed a copy of the transcript and the necessary report on its consideration of the hearing with the Secretary; and
- (4) that the State has acquired the permit necessary to build a bridge of the Genesee River.

The Defendant-Appellee made a motion to vacate and dissolve the injunction and Order of Reversal and Remand made by the United State Court of Appeals of the Second Circuit brought on by an Order to Show Cause, dated July 25, 1977. Such motion was heard by the Hon. Harold Burke in the District Court for the Western District of New York on July 28, 1977. After hearing counsel for both parties and upon the consideration of the Petition of Robert Kirby, Regional Federal Highway Administrator; the Affidavit of Victor E. Taylor, Division Administrator, Federal Highway Administration; and the Affidavit of William C. Hennessy, Commissioner of Transportation of the State of New York, and the Answer of Ray Huther and the Affidavit in Opposition of Wayne M. Harris, Judge Burke granted Defendant-Appellee's motion on July 29, 1977. Judge Burke adopted in toto the Defendant-Appellee's Findings of Facts and Conclusions of Law. In his Findings, Judge Burke found that Secretary Volpe met all the procedural and substantive requirements of the December 18, 1972 decision of the United States Court of Appeals. In accordance

with these Findings of Facts and Conclusions of Law, a judgment was entered on August 1, 1977, granting the motion of Secretary Volpe on the ground that each and every requirement of the December 18, 1972 opinion of the United States Court of Appeals had been met by him. It is from this judgment that the Conservation Council has appealed.

STATEMENT OF FACTS

The Rochester "Outer Loop" of New York Route 47 (hereinafter "Outer Loop") is a part of the Federal-Aid Highway Program for which it is anticipated that the United States Government will reimburse the State of New York for approximately 60% of the cost. The "Outer Loop" runs south and east from Interstate 490 at a point west of the Rochester City Limits, and ends at Scottsville Road, southwest of the City proper. At Winton Road, approximately 4.25 miles east of the Scottsville Road interchange, the "Outer Loop" resumes and runs east and north until it again connects with Interstate Highway 490, east of the City proper. Lying between the Scottsville Road and Winton Road interchanges is the Genesee Valley Park. In order to connect these two segments, it is proposed to cut through the Park for a distance of approximately 3200 feet with a six-lane divided highway. This construction will include a bridge over the Genesee River within the Park. Of the approximately 3200 feet of highway to go through the Park, approximately two-thirds is to be a viaduct-type structure. This project involves about 10.7 acres of improved parkland.

The Genesee Valley Park, owned by the City of Rochester, contains over 800 acres of land and has been maintained as a public park since the late 1800's. It is the only multiple use park in the City of Rochester and contains swimming and picnic facilities, ball diamonds, play areas, one of the nation's four oldest public golf courses, hiking and boating areas, tree shaded lanes and groves of trees. The Genesee River flows through the Park for nearly a mile and the Erie Barge Canal cuts across it for approximately 2900 feet.

The proposed alignment of the Outer Loop is to cross the Park along the Erie Barge Canal corridor and cross the Genesee River near its confluence with the canal.

On May 7, 1971, Secretary Volpe approved a four-page memorandum intending it to comply with the requirements of an Impact Statement as required by the National Environmental Policy Act of 1969, Section 102(2)(c); the Department of Transportation Order 5601.1 (October 7, 1970), designed to implement NEPA; and the Department of Transportation Act, Section 4(f).

On January 21 and 23, 1975, a public hearing was held at the Monroe County Community College in Rochester, New York, the purpose of which was to make a public presentation of the proposal of the State Department of Transportation to construct a portion of the Outer Loop through the Park in order to connect the Scottsville Road and Winton Road interchanges. See Transcript of Public Hearing, January 21 and 23, 1975, p. 2. No attempt was made by the State Department of Transportation to solicit the viewpoints of groups who would be interested in the project, as is required by the Federal-Aid Highway Act and the Department of Transportation Act. No social or economic study was done by the Department of Transportation.

The Final Environmental Impact Statement was submitted and approved by the New York State Department of Transportation on November 18, 1975. The Federal Highway Administration approved the Final Environmental Impact Statement on May 18, 1977.

APPELLANTS' CONTENTIONS

I. Secretary Volpe has not complied with Section 102 of the National Environmental Policy Act, of 1969 and the Department of Transportation Order 5610.1B, designed to implement it, by failing to make a social impact study of the "Outer Loop" project.

II. Secretary Volpe's approval of the use of the Genesee Valley Park for highway purposes was a violation of Section 138 of the Federal-Aid Highway Act, Section 4(f) of the DOT Act, and DOT Order 5610.1B, and therefore beyond the scope of his authority, and was arbitrary, capricious, and an abuse of discretion.

A. Secretary Volpe's approval of the use of the Genesee Valley Park for highway purposes was beyond the scope of this authority.

B. Secretary Volpe's approval of the use of the Genesee Valley Park for highway purposes was arbitrary, capricious, and an abuse of discretion.

I. SECRETARY VOLPE HAS NOT COMPLIED WITH SECTION 102 OF THE NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 AND THE DEPARTMENT OF TRANSPORTATION ORDER 5610.1B, DESIGNED TO IMPLEMENT IT, BY FAILING TO MAKE A SOCIAL IMPACT STUDY OF THE "OUTER LOOP" PROJECT.

It is an uncontestible truth that man is bound by the environment he creates. With this realization, Congress passed the National Environmental Policy Act of 1969, 42 U.S.C. §4321 et seq., (hereinafter referred to as NEPA). The purpose of NEPA is "to declare a national policy which will encourage productive and enjoyable harmony between man and his environment." 42 U.S.C. §4321. Title I of NEPA imposes a broad scope of responsibility upon federal agencies to promote efforts to improve the environment. Both procedural and substantive duties are imposed on them to implement that policy. Title II provides for the creation of a Council on Environmental Policy and requires the President to submit an Environmental Quality Report to Congress annually. Unlike other environmental policy statutes which impose specific duties on the federal agencies, NEPA declares a broad and comprehensive national environmental policy. It requires that "to the fullest extent possible" the policies, regulations, and other statutes be interpreted in accordance with the policy and goals set forth in it. 42 U.S.C. §4322.

Section 102(2)(c) of NEPA requires that "in any major federal actions significantly affecting the quality of the human environment," the responsible official of the agency involved prepare a detailed statement of:

- (1) the environmental impact of the proposed action,

- (ii) any adverse environmental effect which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. §4322(2)(C).

The Department of Transportation (hereinafter referred to as DOT) established rules and regulations designed to implement the goals and policies of NEPA §102(2)(c). DOT Order 5610.1 was first issued in October, 1970, and outlined procedures for the DOT regarding the preparation of the detailed environmental statement required of NEPA §102(2)(c). That Order was revised in October, 1971 by DOT Order 5610.1A. In September, 1974, DOT promulgated Order 5610.1B, cancelling Order 5610.1A.

DOT Order 5610.1B and its Attachments issued September, 1974, apply to final environmental impact statements submitted to the Secretary of DOT for concurrence on or after September 30, 1974. It also applies to all impact statements filed by DOT with the Council on Environmental Quality after September 30, 1974. DOT Order 5610.1B, p. 31, Paragraph 15. In the present case, the Final Environmental Impact Statement was both submitted to the Secretary of DOT for concurrence and transmitted to the Council on Environmental Quality after September 30, 1974. The Defendant-Appellee admits both these facts. See William C. Hennessy Affidavit; Victor E. Taylor Affidavit; and William E. Nostrand, Jr., Affidavit.

Therefore, DOT Order 5610.1B and its Attachments apply in this case.

The intent of NEPA and DOT Order 5610.1B specifically require DOT to identify in its Final Environmental Impact Statement the social impact of the proposed project, including the following:

- a. Particular effects of a proposal on the elderly, handicapped, non-drivers, transit dependent, or minorities should be described to the extent reasonably predictable.
- b. How the proposal will facilitate or inhibit their access to jobs, educational facilities, religious institutions, health and welfare services, recreational facilities, social and cultural facilities, pedestrian movement facilities, and public transit services.
DOT Order 5610.1B, Attachment 2, p. 13, Paragraph 8(a) and (b).

In the present case, a reading of the Final Environmental Impact Statement will show that no social impact statement was prepared by DOT whatsoever. Final Environmental Impact Statement, Volumes I-III. In fact, the only study of the social and economic effects of the proposed "Outer Loop" project which was conducted, was prepared by the Appellants and presented by them at the public hearing on January 21, 1975, and demonstrated a significant adverse impact, both social and economic on a large segment of people in the City of Rochester. See Transcript of Public Hearing, pp. 57-132. DOT nowhere determined how many people actually utilize the Park, nor did it attempt to determine their financial status, ages, the accessibility of a motor vehicle or mass transit, or any physical or mental handicaps. Without knowing the foregoing facts and figures DOT could not possibly have considered and identified the social and economic impact of the proposed project in its Final Environmental Impact Statement as required by its own order.

The duty imposed on DOT officials by the language of Order 5610.1B is mandatory. It requires a formal detailed analysis of the social impacts of a proposed project, supplementary to the requirements of NEPA Section 102(2)(c). 42 U.S.C. 4335. In Monroe County Conservation Council, Inc. v. Volpe, 472 F 2d, 693 (1972), the United States Court of Appeals for the Second Circuit held that even where a statute may not require such, where DOT's own orders require formal detailed findings, DOT "should follow its own directive." Monroe County Conservation Council, Inc. v. Volpe, supra, at 699, Footnote 5. DOT Order 5610.1B does not allow DOT to make a cursory study in order to justify a conclusion it wants to achieve nor can DOT argue that its own rules and regulations designed to implement and supplement NEPA are discretionary. Clearly, DOT Order 5610.1B mandates DOT to include in the Final Environmental Impact Statement a detailed statement of the social impact of a proposed project, which was not done at all in the present case. Judicial enforcement of the duties imposed by NEPA and DOT Order 5610.1B is necessary when, as here, a concerned federal agency does not follow its own mandatory procedures but rather continues with its entrenched attitudes and procedures that result in environmental degradation.

In light of the above, Appellants submit that Appellee's failure to comply with NEPA and its own Order 5610.1B is inadequate as a matter of law, and that compliance with them is a condition precedent to the disbursement of federal funds for the "Outer Loop."

II. SECRETARY VOLPE'S APPROVAL OF THE USE OF THE GENESEE VALLEY PARK FOR HIGHWAY PURPOSES WAS A VIOLATION OF SECTION 138 OF THE FEDERAL-AID HIGHWAY ACT, SECTION 4(f) OF THE DOT ACT AND DOT ORDER 5610.1B, AND THEREFORE BEYOND THE SCOPE OF HIS AUTHORITY AND WAS ARBITRARY, CAPRICIOUS, AND AN ABUSE OF DISCRETION.

A. SECRETARY VOLPE'S APPROVAL OF THE USE OF THE GENESEE VALLEY PARK FOR HIGHWAY PURPOSES WAS BEYOND THE SCOPE OF HIS AUTHORITY.

Section 138 of the Federal-Aid Highway Act (23 U.S.C. 138) and Section 4(f) of the DOT Act (49 U.S.C. 1653(f)) declare it is the "national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands." They further prohibit the approval by the Secretary of the DOT of the use of federal funds for construction of highways through a "public park...of national, state or local significance... unless (1) there is no feasible and prudent alternative to the use of the such land and (2) such program includes all possible planning to minimize the harm to such park, recreational area... or historic site resulting from such use." (Emphasis added). In Monroe County Conservation Council, Inc., v. Volpe, supra, at 700, the United States Court of Appeals said, "These statutes which are particularly intended to protect parkland, represent a determination by Congress that "everything possible should be done to insure [parklands] being kept free of damage or destruction by reason of highway construction"."

First, in the present case, it is admitted by the Appellee that the Genesee Valley Park is a park of significance included within the statute. See Defendant's Answer, Page 3, Para. 15. Therefore, the

language of Sections 4(f) of the DOT Act and 138 of the Federal-Aid Highway Act make it clear that federal funds may be used to construct the "Outer Loop" through the Genesee Valley Park only if there are no feasible and prudent alternatives. In Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 411 (1971), the United States Supreme Court stated this allowed for such use "only in the most unusual circumstances." In order to find that Secretary Volpe acted within the scope of his authority by approving the use of federal funds to finance the construction of the "Outer Loop" through the Genesee Valley Park, he must show that he "could have reasonably believed that in this case there were no feasible alternatives or that the alternatives involved presented unique problems." Id. at 416. In other words, "a road must not take parkland unless a prudent person, concerned with the quality of the human environment, is convinced that there is no way to avoid doing so." Monroe County Corporation Council, Inc. v. Volpe, supra, at 700. A feasible alternative route is one that is compatible "with sound engineering." Overton Park v. Volpe, supra, at 411; See also, Monroe County Conservation Council, Inc. v. Volpe, supra at 700 ; See also, D.C. Federation of Civic Associations v. Volpe, 459 F. 2d 1231, 1237 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972). A prudent alternative is one without "truly unusual factors so that the cost or community disruption would reach extraordinary magnitudes." Monroe County Conservation Council, Inc. v. Volpe, supra, at 700 ; See also, Overton Park v. Volpe, supra, at 412-413.

In the present case, if we assume the position of DOT, which is that the proposed route designated to go through Genesee

Valley Park is the less costly and more direct method of completing the construction of the highway, the statutes' requirements still have not been met. The DOT cannot first select a route and later try to justify it by such an approach. This is the very result sought to be avoided.

In addition to the directive of Sections 138 of the Federal-Aid Highway Act and 4(f) of the DOT Act that there be "no feasible and prudent alternative" is the requirement that all possible alternatives be investigated. This requirement is also enunciated in Sections 102(2)(c)(iii) and 102(2)(d) of NEPA.

DOT Order 5610.1B, Attachment 2, Paragraph C, sets forth the specific substantive and procedural requirements for DOT officials when considering all feasible alternatives. Data which must be gathered for each alternative location includes "detailed cost estimates (with figures showing percentage differences in total project costs) and technical feasibility, and appropriate analysis of the alternatives, including any unique problems present and evidence that cost or community disruptions resulting from alternative routes reach extraordinary magnitudes," DOT Order 5610.1B, Attachment 2, Paragraph C. The Order further states that the foregoing requirements should be done in such a manner as to comply with the United States Supreme Court mandate in the Overton Park case, supra, at 412-413, as follows:

The very existence of the statute indicates that the protection of parklands was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from the alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the

destruction of parkland unless he finds that the alternative routes present unique problems. (Emphasis added).

In the present case, the entire concept of the "Outer Loop" was conceived, planned and partially constructed with the intent of placing a portion of the highway through the Genesee Valley Park. Appellants submit the DOT's purported compliance with the statutes, to consider all feasible alternatives, was a sham from the outset. It selected alternate routes and designs which, no one could argue otherwise, were infeasible and not prudent. See Final Environmental Impact Statement, Volume I, pp. 46-78. Appellants submit that the only alternative which the DOT in good faith seriously considered, was that of completing the "Outer Loop." Within that concept, four location alternatives were considered, three of which contemplated completing the "Outer Loop" through the Genesee Valley Park. The only location alternative which avoided the Park consisted of one utilizing and improving existing surfact arterials around the Park. Id. at p. 49. It is indeed unusual that the Secretary failed to consider as an alternative, constructing the highway immediately to the south of the Park.

It is therefore the contention of the Appellants that Appellee failed to comply with both the spirit of the statutes and their technical requirements. The statutes specifically require a detailed study of all feasible and prudent alternatives. A reading of the Final Environmental Impact Study will clearly show lack of compliance therewith. The alternatives which the Appellee purportedly did in fact consider were not done so in good faith within the spirit of the statutes, which in turn are to be interpreted in accordance with the broad and comprehensive environmental

policies and goals set forth in NEPA. In Calvert Cliff's Coordinating Committee, Inc. v. Atomic Energy Commission, 449 F. 2d 1109, 1115, (1971), the United States Court of Appeals for the District of Columbia Circuit stated that NEPA was not intended to be a "paper tiger." That Court further stated that the requirement of studying all possible feasible and prudent alternatives, "like the 'detailed statement' requirement, seeks to insure that each agency decision-maker has before him and takes into proper account all possible approaches to a particular project (including total abandonment) which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent optimally beneficial decision will ultimately be made." Id. at 1114.

Furthermore, even if there is no feasible and prudent alternative to taking the parkland, Sections 4(f) of the DOT Act, Section 138 of the Federal-Aid Highway Act, and DOT Order 5610.1B, Attachment 2, Page 9, Paragraph d, prohibit the Secretary of DOT from giving his approval of a project until there has been "all possible planning to minimize harm to such park." See also, Monroe County Conservation Council, Inc. v. Volpe, supra, at 700. Included in measures to be considered which would minimize harm to the Park, is that of tunneling. Appellee purportedly complied with this requirement. Final Environmental Impact Statement, Volume II, Appendix C. Appellants however submit that the figures used by Appellee are greatly inflated and exaggerated, represent unnecessary costs and are a result of an inadequate and incomplete study of the possibility of a tunnel. Appellants also submit that the tunnel alternative was not reviewed since there is no data on test borings

nor is there any proof that they were in fact done in the Final Environmental Impact Statement. The only evidence on this was gathered by Appellants. That information revealed that it is in fact less expensive over a period of time and less harmful to the environment to build a tunnel rather than a bridge. See Transcript of Public Hearing, January 21, 1975, pp. 90-103. Despite the exaggerated costs, the DOT built into the idea of a tunnel, and they concluded that "each of the tunnel alternatives is considered workable." Final Environmental Impact Statement, Volume II, p. 80.

Appellants therefore submit in view of the foregoing considerations that Secretary Volpe misconstrued his authority when he approved the use of the Genesee Valley Park for highway purposes. Appellants further submit that the holding of the District Court below in the present case should not be given weight in view of its failure to comply with the duties imposed on it by the United States Supreme Court in the Overton Park case. The Supreme Court stated that to determine if the Secretary of DOT, in approving the taking of parkland, has acted properly, the District Court must make "a thorough, probing, in-depth review." Overton Park v. Volpe, supra at 415. See also, Monroe County Conservation Council v. Volpe supra, at 700. It is abundantly clear in the present case, that the District Court could not have possibly have had the opportunity to undertake such a review in light of the fact that a decision was rendered by that court within one day after receiving the relevant papers, which included the three large volumes of the Final Environmental Impact Statement and the two volumes of testimony taken at the public hearing held January 21, 1975, and the Court

conducted a trial in another case following the motion.

B. SECRETARY VOLPE'S APPROVAL OF THE USE OF THE GENESEE VALLEY PARK FOR HIGHWAY PURPOSES IS ARBITRARY, CAPRICIOUS, AND AN ABUSE OF DISCRETION.

In order to find that the approval of parkland was not "arbitrary, capricious and an abuse of discretion, or not otherwise in accordance with law", it must be shown there was a "consideration of the relevant factors" and that there has not been "a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, supra, at 416, citing Sections 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. Section 706(2)(A). Because the necessary requirements of NEPA, DOT Order 5610.1B, Federal-Aid Highway Act, and DOT Act, were not met, it would be impossible for Secretary Volpe to have based his decision on a "consideration of the relevant factors." The lack of consideration both of the social impact of the "Outer Loop" and all possible feasible and prudent alternatives and measures to minimize the harm, compel a conclusion that the approval of the highway through the Genesee Valley Park was clearly erroneous. A further review of the record indicates that the Final Environmental Impact Statement, approved by the DOT was merely a justification of a highway which was preconceived and intended as part of a sophisticated and complex highway system around the City of Rochester, made without ever seriously considering the environmental impact of the project. The principal established by NEPA is that the consideration of environmental matters by a U.S. agency "must be more than a pro forma ritual. Calvert Cliff's Coordinating Committee v. Atomic Energy Commission, supra, at 1128. Clearly, the approval in the present case was nothing more than a pro forma

ritual. The Appellants therefore submit that the holding of the District Court below that all the statutes' requirements have been met by the Secretary of DOT, was erroneous as a matter of law.

CONCLUSION

The Appellants urge this Court to reverse the decision of the District Court and reinstate its own order of December 18, 1972, thereby enjoining Secretary Volpe from releasing federal funds or in any manner obligating the federal government to any further extent in the federal participation of the construction of the Rochester "Outer Loop" project, until such time as all statutes are complied with.

Respectfully submitted,

HARRIS, MALONEY, HORWITZ & EVANS
(Wayne M. Harris, Esq., of Counsel)
Attorneys for Appellants
226 Powers Building
Rochester, New York 14614
716-454-6950

TITLE I

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

42 U.S.C. § 4321 et seq.

Purpose

Sec. 2. The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

TITLE I

DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

Sec. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable

means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and

approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with policies set forth in this Act, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be

avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize

international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

Sec. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

Sec. 104. Nothing in section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Sec. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

SECTION 138
FEDERAL-AID HIGHWAY ACT
23 U.S.C. § 138

138. Preservation of parklands.--It is hereby declared to be the national policy that in carrying out the provisions of this title, the Secretary shall use maximum effort to preserve Federal, State, and local government parklands and historic sites and the beauty and historic value of such lands and sites. The Secretary shall cooperate with the States in developing highway plans and programs which carry out such policy. After July 1, 1968, the Secretary shall not approve under section 105 of this title any program for a project which requires the use for such project of any land from a Federal, State, or local government park or historic site unless such program includes all possible planning, including consideration of alternatives to the use of such land, to minimize any harm to such park or site resulting from such use.

SECTION 4 (f)

DEPARTMENT OF TRANSPORTATION ACT

49 U.S.C. § 1653 (f)

(f) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968 (Aug. 23, 1968), the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

DOT 5610.1B
9/30/74

APPLICABILITY

Page 31

a. Except as provided in subparagraph c. below, this Order and Attachments 1 and 3-5 apply to all draft and final statements filed by DOT with CEQ after September 30, 1974.

b. Except as provided in subparagraph c. below, Attachment 2 applies to all draft and final statements filed by DOT with CEQ on and after November 29, 1974. Paragraphs 8.o. and 9.c.-f. of DOT Order 5610.1A apply to all statements filed before that date.

c. This Order and attachments do not apply to final statements submitted to the Office of the Secretary for concurrence before September 30, 1974. DOT Order 5610.1A continues to apply to them.

DOT Order 5610.1B
9/30/74

OTHER SOCIAL IMPACTS

Attachment 2
Page 13

The general social groups specially benefitted or harmed by the proposed action should be identified in the statement, including the following:

a. Particular effects of a proposal on the elderly, handicapped, non-drivers, transit dependent, or minorities should be described to the extent reasonably predictable.

b. How the proposal will facilitate or inhibit their access to jobs, educational facilities, religious institutions, health and welfare services, recreational facilities, social and cultural facilities, and public transit services.

DOT ORDER 5610.1B
9/30/77

Attachment 2
Pages 9-10

- c. Similar data as appropriate, for alternative designs and locations, including detailed cost estimates (with figures showing percentage differences in total project costs) and technical feasibility, and appropriate analysis of the alternatives, including any unique problems present and evidence the cost or community disruptions resulting from alternative routes reach extraordinary magnitudes. This portion of the statement should demonstrate compliance with the Supreme Court's statement in the Overton Park case, as follows:

"The very existence of the statute indicates that the protection of parklands was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that the alternative routes present unique problems."

- d. If there is no feasible and prudent alternative, description of all planning undertaken to minimize harm to the protected area and statement of actions taken or to be taken to implement this planning, including measures to maintain or enhance the natural beauty of the lands traversed.

- (1) Measures to minimize harm may include replacement of land and facilities, providing land or facilities, provision for functional replacement of the facility (see 49 C.F.R. 25.267).

- (2) Design measures to minimize harm; e.g., tunneling, cut and cover, cut and fill, treatment of embankments, planting, screening, maintenance of pedestrian or bicycle paths and noise mitigation measures all reflecting utilization of appropriate interdisciplinary design personnel.

